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NO. 98-41

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ROBERT L. VERA CRUZ,
Petitioner,

vs.

CITY OF ESCONDIDO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Respondent seeks to avoid review by mischaracterizing the factual and procedural record below and the many cases in circuit courts which have employed the Model Penal Code definition of "deadly force" in applying the Fourth Amendment in the context presented by the Petition. Though Respondent enthusiastically embraces the new rule created by the Ninth Circuit in this case, there is no doubt that it is a new rule and is at odds with the holdings and reasoning of many other circuit court opinions.

This Court did not decide the issue presented in either *Tennessee v. Gardner*, 471 U.S. 1 (1985), or *Graham v. Conner*, 490 U.S. 386 (1989); the issue of the proper Fourth Amendment standard to be applied to the mauling of a misdemeanor suspect by a police dog is of considerable national importance and this Court should not accept Respondent's invitation to wait to see if other circuits change their views to apply the new rule created by the Ninth Circuit here. Indeed, there is already evidence, in the only post *Vera Cruz* case, that this conflict will remain. *See Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998).

II. RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Respondent is wrong in arguing that the facts must be viewed in the light most favorable to the defense. The issue is whether petitioner's requested jury instructions on deadly force (Pet. 6-8), should have been given. As the Ninth Circuit recognized, in this procedural context, an appellate court must look at the facts in the record favorable to that theory. Pet. App. 6a. *See Don Burton Inc. v. Aetna Life & Cas. Co.*, 575 F.2d 702, 206 (9th Cir. 1978 ("[A] litigant is entitled to have the jury charged concerning his theory of the case if there is

any direct or circumstantial evidence to support it.") In this procedural posture, the facts set forth in the Petition are therefore the relevant universe of facts and not the facts set forth by Respondent to justify the jury's verdict. Thus, the issue on which Petitioner seeks review is squarely presented in this Petition.

Respondent advances two factual propositions in its effort to reframe this case as one in which the question presented is not ripe for review. First, Respondent claims that deadly force may have been justified here under the *Garner* standard, by claiming that because Petitioner wore a sheathed knife on his hip and was intoxicated, he became a felony suspect who presented a danger of death or severe bodily injury to persons in the area. Opp. Cert. 2-3. Second, Respondent argues that Petitioner was not entitled to the deadly force instruction he requested because the record would not support the finding that the use of a police dog to bite and hold a person constitutes force that is reasonably likely to cause serious bodily harm. Respondent simply misconstrues the record on both crucial points.

A. The Record Is Clear That Petitioner Was a Misdemeanor Suspect Who Presented No Risk of Death or Grave Harm to Others

First, the record is clear that on the night in question, Respondent's officers viewed Petitioner as a misdemeanor "drunk and disorderly" suspect. AER 214 (Ex. 83A, transcript of broadcast).

While Petitioner may have carried a sheathed knife on his hip, it was not unlawful to do so. (6/20/95 RT 142:2-5.) Furthermore, at no time did Petitioner reach for the knife, or make any threatening gestures of any kind, nor did Distel hear

any threats. (6/20/95 RT 142:6-142:18.) Indeed, while Respondent tries to raise the spectre of Petitioner as a violent felon against whom even force likely to kill would have been justified, at trial, Distel admitted specifically that he did not have cause to believe that deadly force was justified.[1]

B. The Force Used Was Likely to Cause Substantial Bodily Harm, Thus Squarely Presenting the Issue of What Constitutes "Deadly Force" under *Garner*

Respondent likewise fails in its efforts to argue that this case is not ripe for review due to an alleged failure by Petitioner below to prove that the force used was sufficient to cause serious bodily injury. Opp. Cert. 8-9. This argument flies in the face of the facts as relied upon by the Circuit Court when it reached the decision herein challenged:

> Vera Cruz himself required surgery and eight days of hospitalization. At trial, four witnesses testified that such injuries are not unusual; police dogs can - and often do - cause serious harm. One witness testified that he knew of cases where dogs had bitten a person on the face, bitten part of a person's nose off, bitten people in the genitals, and bitten a woman's breasts." Pet. App. 6a.

Indeed, the Ninth Circuit specifically determined that the facts of this "case squarely presents this question" of

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[1] "Q: At the time you gave the dog the "forahn" command [bite command], you did not have the justification for using lethal force, did you?

A: No, I did not."

I RT 131:8-10, 21-23.

whether "force likely to result in serious injury (but not death) amounted to deadly force." *Id.*

III. THERE IS A CONFLICT IN THE CIRCUITS THIS COURT SHOULD RESOLVE

Respondent attempts to convince the Court that the numerous federal appellate cases that have adopted and applied the Model Penal Code definition of "deadly force" do not truly conflict with the Ninth Circuit's opinion below. Respondent cannot, however, dispute two key points: first, no other court has ever adopted, or even hinted at, Judge Kozinski's definition of "deadly force" or any definition of that term that does not encompass serious bodily injury; second, every other court to face the issue, including the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, has either explicitly adopted, or assumed the correctness of, the definition urged here by Petitioner. Respondent argues that there is "no meaningful conflict" between the Ninth Circuit's decision and other federal case law, because other circuits have "alluded to," rather than "adopted," the MPC definition, and because other courts have not reached the issue presented here. Respondent's argument depends on its painstaking effort to deconstruct each of the opinions that is at odds with the Ninth Circuit's new definition in order to show that other courts have not "adopted" the MPC definition. Respondent does not succeed in this effort because other courts have adopted the MPC definition. In fact, contrary to Respondent's insinuations, Judge Kozinski's opinion itself concedes that "[o]ther circuits do seem to have adopted the MPC's definition of deadly force." *Vera Cruz*, 139 F.3d at 662.

Respondent goes to great lengths to articulate an interpretation of *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985) that makes it appear consistent with *Vera*

Cruz and inconsistent with adoption of the MPC definition of "deadly force." Opp. Cert. 15-16. Respondent fails in this attempt, because *Pruitt* explicitly adopted a "death or serious bodily harm" definition of deadly force. The following quotation from that opinion makes this point conclusively:

> The above-quoted definitions [including the Model Penal Code and the definition set forth in *Mattis* [*v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976)], both setting forth the "substantial risk of causing death or serious bodily harm" standard] clearly encompass Kidd's actions in shooting Pruitt; Kidd, at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury. We find such action a "use of deadly force" in the constitutional sense, concluding that such finding is consistent with *Garner*."

Pruitt, 771 F.2d at 1480, n.10. Despite Respondent's confusing mischaracterization, *Pruitt* plainly and specifically reached the issue of whether "force capable of causing serious physical injury" is "deadly force" under *Garner*, and answered this question in the affirmative. Moreover, as noted below, the Tenth Circuit in *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987) concluded that *Pruitt* "adopted" the MPC definition; even Judge Kozinski, in his opinion below, noted that the Eleventh Circuit in *Pruitt* "approv[ed]" the MPC's definition." Pet. App. 8a. *Pruitt*'s discussion of the definition of deadly force alone – not to mention the fact that *Pruitt* has been cited in the Tenth Circuit as well for this definition – establishes that the Ninth Circuit's opinion has created a clear inter-circuit conflict.

Respondent's similarly tortured reading of *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) – and its conclusion that "*Robinette* cannot properly be cited as supporting the MPC's definition of deadly force" – also cannot stand even the most casual reading of that decision. Opp. Cert. p.17. The court in *Robinette*, "[a]pplying [the MPC] factors to the present case," found that deadly force was not used because there was no substantial risk of "causing death or serious bodily harm." 854 F.2d at 912. Although – as in any case where a court finds deadly force was not used – the decision was theoretically "consistent" with the Ninth Circuit's new definition, the court in fact adopted and applied the MPC. While the court may have had "no need to determine whether the MPC definition of deadly force was correct" on the facts presented, Opp. Cert. 18, the court nonetheless did accept and adopt this definition. Indeed, at least three other federal appellate courts have cited *Robinette* for the specific proposition that the MPC provides the correct constitutional definition of "deadly force."[2] *Gutierrez v. City of San Antonio*, supra; *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997); *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994).

Other appellate cases demonstrate the depth and breadth of the consensus that the MPC is the authoritative source of the definition of "deadly force." For example, while Respondent – focused on semantics not substance – character-

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[2] Respondent contends as well that the court in *Matthews v. Jones*, 35 F.3d 1046 (6th Cir. 1994) "does not 'adopt' the MPC definition of deadly force." Opp. Cert. 18. In fact, that case makes clear, just as *Robinette* does, that it applies the MPC standard of "substantial risk of causing death or serious bodily harm." 35 F.3d at 1050-51.

izes the court in *Mattis v. Schnarr*, *supra*, as having "employed" rather than "adopted" the MPC definition, the court in fact stated that "[w]e *use* the term ["deadly force"] in this opinion as it is used in the Model Penal Code." *Id.* at 1099 n.2 (emphasis added). As in the other cited cases, the court explicitly adopted the MPC definition, and analyzed the facts of the case before it using that definition. Similarly, in defining "deadly force," the court in *Ryder v. City of Topeka* cited only to the MPC and to cases that it characterized as having "adopted" it. 814 F.2d at 1416-17 n.11. The Seventh Circuit, in *Estate of Phillips v. City of Milwaukee*, *supra*, applied the same definition, citing *Robinette*. 123 F.2d at 593-94.

Finally, contrary to Respondent's characterization of *Gutierrez v. City of Antonio*, *supra*, as a case that "does not meaningfully conflict with *Vera Cruz*," that recent case amply and definitively illustrates the now existing conflict between circuits. The court in *Gutierrez* held that on the facts alleged before it, "hog-tying" a suspect was an act of "deadly force." In so holding, the court adopted a "death or serious bodily harm" standard for the definition of "deadly force" in the Fifth Circuit, and further held that this definition was clearly established prior to November 1994, relying explicitly on the consensus among federal appellate courts adopting the MPC definition, on the MPC provision as codified in the Texas Penal Code, and on the similar provision of the San Antonio Police Department Procedure manual. 139 F.3d at 446. Respondent's contention that "the identical result would have been reached even if [the court] had utilized a definition similar to that adopted in *Vera Cruz*," Opp. Cert. 24, is pure speculation, and is almost certainly incorrect in the factual context presented in *Gutierrez*. More importantly, Respondent misses the point that regardless of whether it would or

could have reached the same result using the Ninth Circuit's new definition, the court did not use or adopt that definition, but instead explicitly adopted the definition urged by Petitioner and applied by all other courts that have had occasion to define "deadly force" in the Fourth Amendment context.

Not only is there a consensus among federal appellate courts as to the applicability of the MPC definition of "deadly force" to the Fourth Amendment context, but several courts have explicitly cited that consensus in applying the definition. *See, e.g., Gutierrez*, 139 F.3d at 446 (*citing, inter alia, Robinette, supra*, and *Estate of Phillips, supra*); *Ryder, supra*, 814 F.2d at 1416 n.11 ("[s]everal courts of appeals have adopted the Model Penal Code definition of deadly force," citing *Pruitt, supra*, and *Mattis, supra*); *Estate of Phillips* (*citing, inter alia, Robinette, supra*). The *Vera Cruz* panel itself recognized this consensus. Pet. App. 8a. Far from "seiz[ing] the MPC's definition for want of something better," these courts – with the exception of the panel that decided *Vera Cruz* – cited and applied the definition that they correctly took to be the operative and normative constitutional standard as applied by other courts and by law enforcement agencies, in light of this Court's decision in *Garner*. Certainly, no court has ever expressed the belief, articulated by Respondent, that the MPC-based definition used by the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits is at odds with this Court's decisions in *Garner* and *Graham*, and that the "interplay" of those decisions compels that Judge Kozinski's definition be used. Opp. Cert. 6. The fact that Respondent finds this conclusion – a conclusion that no other court, including the Fifth Circuit panel that recently decided *Gutierrez*, has even alluded to – in the opinion below, in the face of so many decisions applying the MPC definition, demonstrates both the existence of a clear inter-circuit

conflict, and the need for this Court to decide this important question of federal law.

IV. GARNER AND GRAHAM DO NOT RESOLVE THE ISSUE AT HAND

The Ninth Circuit made clear it was addressing an issue *Garner* left open, namely what is "deadly force" such that the Constitution requires a specific justification for its use; yet, Respondent argues that the issues in this case are effectively decided by *Graham* and *Garner*. Opp. Cert. 10-11. Respondent quotes *Graham*'s language, 490 U.S. at 395, that explained that *Garner*'s analysis should be read to mean that *"all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." Respondent inexplicably derives from that language the conclusion that *Garner* "covers only the far more limited circumstance where a suspect's life itself is put at risk by the officer's use of force." Opp. Cert. 11.

Respondent misses the point. *Garner* does more than announce that unreasonable force by police officers is unconstitutional – it specifies that "deadly force" is per se unreasonable absent probable cause to believe that the person against whom force is used presents a threat of serious physical harm or death to the officer or others. The question here is not whether *Garner* was correct, but what *Garner* meant by "deadly force," a definition that is not found within the text of *Garner* but that is fairly to be found in the reasonableness requirements implied there and made explicit in *Graham*. Anglo-American jurisprudence has long understood force that is likely to maim as being on par as force that is likely to kill – indeed, in California today, aggravated

mayhem is punishable by life in prison. Cal. Penal Code §205. The MPC definition of "deadly force" understood to apply by the circuits that have addressed this question does not knit a definition out of supposition, or even express a normative understanding of how seriously we should view such force. Rather, it expresses a consensus-based understanding of "deadly force." That understanding recognizes force that is reasonably likely to rip off one's triceps (or, as the Ninth Circuit understood, force that has been shown to "bit[e] part of a person's nose off, bit[e] people in the genitals, and bit[e] a woman's breasts") is an extraordinarily serious matter, on par with force that can kill, and should be justified by the same standard as we require in circumstances when we allow officers to use force likely to kill.

CONCLUSION

For all of these reasons, the Petition should be granted.

Respectfully submitted,

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